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Criminal Division
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Standing / Innocent Owner / Excessive Fines / CMIR Forfeiture

- **Under *Bennis v. Michigan*, innocent third party may not challenge forfeiture under 31 U.S.C. § 5317.**

- **Forfeiture of unreported funds in CMIR case is not excessive, even if the funds belonged to someone other that the person guilty of failing to file the report.**

A traveller bound for the Dominican Republic from JFK Airport filed a CMIR form stating that he was carrying $7,000 in currency. When further investigation revealed that the traveller was actually carrying more than $83,000, most of which was concealed in two cereal boxes, the money was seized, and the government filed a civil forfeiture action against the currency under 31 U.S.C. § 5317.

A third party filed a claim stating that he, not the traveller, was the true owner of the seized currency. He alleged that the traveller was merely a courier who was carrying the money for him to his mother in Santo Domingo. The claimant also alleged that he did not know that the traveller would fail to file an accurate CMIR form, and that in any event, the forfeiture of all $83,000 would violate the Excessive Fines Clause of the Eighth Amendment if imposed against the interests of an innocent owner. The government filed a motion for summary judgment which the district court granted.

The court first considered whether the claimant had standing to contest the forfeiture of the currency. To establish standing, the court said, one most offer "proof beyond his own statements" that property subject to forfeiture belongs to him and not to the person from whom it was seized. Because the claimant offered no evidence corroborating his statement that he owned the money, he failed to establish standing.

Second, the court held that even if the claimant had standing, he had failed to state a claim upon which relief could be granted under section 5317. The claimant's basis for relief was his alleged status as an innocent owner. Citing the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the claimant argued that a person's money may not be forfeited in a CMIR case if that person has taken all reasonable steps to prevent his money from being involved in any illegal act. Thus, in the claimant's view, an owner cannot be made to forfeit his money solely because a courier fails to file a currency report.

The court held, however, that under *Bennis v. Michigan*, 116 S. Ct. 994 (1996), property owners

have no right to contest a forfeiture on grounds of "innocence" unless the forfeiture statute provides for such a defense. Because section 5317 contains no innocent owner provision, the claimant's property could be forfeited even if it were true that he had entrusted his money to a courier with no reason to suspect that the courier would fail to file the required CMIR form. "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing," the court said, quoting *Calero-Toledo*, "confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."

Finally, the court addressed the claimant's Eighth Amendment claim. Claimant acknowledged that the Second Circuit has held that CMIR forfeitures do not violate the Eighth Amendment "because the quantity of money seized [is] equivalent to the quantity of undeclared funds." *See United States v. United States Currency $145,139*, 18 F.3d 73, 76 (2d Cir. 1994). But the claimant argued that a different rule should apply when the owner of the property is not the wrongdoer. In that case, the claimant said, the forfeiture of the money would be excessive regardless of the nexus between the money and the underlying crime. But the court held that the innocence of the owner should have no bearing on the excessive fines determination. *SDC*

United States v. $83,132.00 in United States Currency, 1996 WL 599725 (E.D.N.Y. Oct. 11, 1996) (unpublished). Contact: SAUSA Richard Weber, ANYE03(rweber).

Comment: Since the Supreme Court's decision is *Bennis*, the Department of Justice has been working on a policy governing the role of the innocent owner defense in cases, such as this one, where there is no innocent owner defense in the forfeiture statute. No policy has been issued, but a draft that has been circulated within the forfeiture community suggests the following guidance should be given: It should be the policy of the United States not to seek forfeiture of property that belongs to an innocent owner. Thus, prosecutors should screen forfeiture cases and decline to seek forfeiture of the interests of an owner who, in accordance with the *Calero-Toledo* standard, took all reasonable steps to prevent the illegal use of his property. However, where the government applies this test and determines that the forfeiture action should be brought, and a claimant nevertheless files an innocent owner claim, the government may properly move to dismiss the claim under *Bennis v. Michigan* for failure to state a claim upon which relief can be granted.

In other words, the government's internal policy to forego forfeiting the property of innocent owners does not confer any rights on claimants in forfeiture cases. Thus, if the government files a forfeiture action, and if upon review of the facts it determines that no innocent person's interests are implicated, the government may rely on *Bennis* and need not give the claimant the opportunity to argue that the government misapplied its policy, and that the case should never have been filed because the claimant satisfied the "all reasonable steps" test. *SDC*

Stay / Civil Discovery

❒ **Court denies pre-indictment stay of civil forfeiture case because government's fear of abuse of civil discovery was too speculative.**

The government filed a civil forfeiture action against numerous bank accounts under 18 U.S.C. § 981, and sought a stay of discovery pursuant to section 981(g). In support of its request for a stay, the government asserted that the claimants were subjects of a related grand jury investigation, and that it was likely that the claimants would seek to use the civil discovery process in ways that would jeopardize the work of the grand jury.

In denying the stay, the court noted that whether or not to grant a *pre-indictment* stay of a parallel civil forfeiture case is a matter wholly within the court's discretion. Once an indictment is returned, the court is required to enter a stay for good cause shown pursuant to subsection (g). But in the pre-indictment context, "the court, in its discretion, must simply balance the moving party's interest in deferring adjudication of the civil claim against the nonmoving party's interest in resolving it."

Here, the court found that the claimants' interest in challenging the seizure of their property "without delay" outweighed the government's interest in obtaining the stay. It was the government, the court noted, that had initiated the civil forfeiture action by seizing the claimants' bank accounts. Claimants, who had yet to be charged with any crime, had no recourse but to contest the forfeiture in order to recover their property "and move on with their lives." On the other hand, the government's fear "that the claimants intend to exploit the . . . discovery rules" was "purely speculative" and did not outweigh the claimants' "real and compelling desire" to have the case move forward.

The court stressed that what the government sought was a blanket stay of the civil case that would preclude all civil discovery. It indicated that if the government were instead to seek a protective order narrowing the scope of discovery to avoid a particular threat to the grand jury investigation, the court might be more sympathetic. *SDC*

United States v. Account #87303569 in the Name of Down East Outfitters, Inc., 1996 U.S. Dist. LEXIS 14555 (E.D.N.C. Sept. 11, 1996). Contact: AUSA Stephen A. West, ANCE01(swest).

Certificate of Reasonable Cause / EAJA Fees

❒ **Because the government's complaint and supporting affidavit showed probable cause, it was entitled to a certificate of reasonable cause even though it was not the prevailing party.**

❒ **Certificate of reasonable cause protects government employees from personal liability, but it does not foreclose award of attorneys fees under the Equal Access to Justice Act.**

❒ Even though the government established probable cause at the outset of the litigation, where the basis for its action later collapsed, its position was not substantially justified under EAJA, entitling claimants to legal fees.

The government filed a civil forfeiture action under 18 U.S.C. § 981(a)(1)(A) and (C). In prior opinions, the court ruled that the complaint should be dismissed as to 80 to 90 per cent of the defendant property either because the government had not established probable cause, or because the 1988 amendments to section 981 did not apply retroactively. *United States v. Eleven Vehicles*, 836 F. Supp. 1147 (E.D. Pa. 1993); *id.* 898 F. Supp. 1143 (E.D. Pa. 1995). The government then dismissed the balance of the case to avoid possible double jeopardy problems.

The government then asked the court to issue a certificate of reasonable cause under 28 U.S.C. § 2465. The court did so. In this latest opinion, it explained that "courts generally look to the moment of seizure in considering whether or not to grant the certificate," not to what developed afterward during the litigation. It found that the agent's affidavit in support of the complaint established probable cause in that it stated that substantially all of Claimant's income was from unlawful conduct and that he used it to buy the defendant properties. Therefore, issuance of a certificate of reasonable cause was appropriate.

The court then turned to the claimants' request for legal fees under the Equal Access to Justice Act (EAJA). As a threshold matter, the court held that the issuance of a certificate of reasonable cause does not foreclose EAJA fees. Section 2465 immunizes the prosecutor from personal liability, the court said, and it prohibits the claimant from recovering his "costs," but "costs" do not include attorney fees.

Examining each of the requirements of an EAJA award, the court went on to hold that the claimants were the "prevailing party," since they achieved their goal of obtaining release of 100% of the *res*, and that the government's position in the litigation was not substantially justified. It explained that in order to avoid EAJA fees, the government must establish not only that its position was substantially justified at the time it filed suit, but that its position remained substantially justified during the litigation. As the case proceeded, it became clear that the government's theory of forfeiture as to most of the defendant property was untenable. Moreover, the government delayed the case, obtaining several stays, and filed late pleadings. Therefore, despite the issuance of the certificate of reasonable cause, the litigation was not substantially justified within the meaning of EAJA.

The government tried to invoke the EAJA exception for special circumstances which would make an award unjust, citing the fact that claimants had executed affidavits to support their summary judgment motions, but then invoked the Fifth Amendment in refusing to answer questions at depositions and trial. The court called this argument spurious: "While adverse legal consequences may flow from claimants' assertion of their Fifth Amendment privileges in a civil proceeding, such an assertion is not the equivalent of unclean hands."

The court held that it could not justify an award to claimants' counsel of more than the statutory $75 per hour on the ground that he worked hard and very ably on a difficult and undesirable case, but that it would increase the $75 rate proportionate to the increase in the cost of living since EAJA was enacted. *BB*

United States v. Eleven Vehicles, ___ F. Supp. ___, 1996 WL 512409 (E.D. Pa. Aug. 30, 1996) (unpublished). Contact: AUSA Pamela Foa, APAE01(pfoa).

Proceeds / Legitimate Source

❒ Proof of purchase of residence with lottery winnings was insufficient to avoid forfeiture as drug proceeds.

In a civil forfeiture bench trial, the District Court for the District of Puerto Rico found that probable cause was established that a residence was the proceeds of narcotics trafficking. The burden of proof shifted to the claimants, common law spouses, to prove that the property was acquired with legitimate income.

At the time of trial, the husband was serving a seven-year sentence for possession of cocaine with intent to distribute, but the claimants asserted that they purchased the residence with money they obtained from winning the lottery. The evidence showed that the husband, who had been unemployed for a year prior to his arrest, won the lottery in April 1991 and was issued a check for $150,000. On May 5, 1991, the claimants signed a sales contract for the residence and put $15,000 cash down. The wife told the realtor that she would pay the balance of the $228,000 purchase price with lottery winnings. Within three days, the wife also won the lottery. On May 15, 1991, the claimants endorsed their lottery checks and closed on the real estate. The source of the $15,000 down-payment was not explained.

A Treasury agent working at the Puerto Rico Lottery testified in rebuttal that local lottery winners are commonly approached while they are in the process of claiming their winnings and convinced by someone to step out of line. He testified that the winners were not subsequently seen cashing their tickets. The Court inferred that third parties, such as the claimants, could obtain winning lottery tickets in exchange for drug proceeds. The Court concluded that the claimants' story that they had each won the lottery within days of each other was "simply unbelievable" and ordered the residence forfeited. *MLC*

United States v. One Urban Lot Number 14,126, ___ F.Supp. ___, 1996 WL 585582 (D. Puerto Rico Sept. 30, 1996) Contact: AUSAs Miguel Fernandez, Jackeline Novas, Jose Vazquez, DPR01(jvazquez).

Excessive Fines

❒ Eighth Amendment proportionality analysis applies to all criminal forfeitures, including forfeiture of proceeds.

The Fourth Circuit remanded a case with instructions to make a proportionality analysis with respect to the property ordered forfeited under 21 U.S.C. § 853. After determining that under Fourth Circuit law the proportionality analysis should be made with respect to both the instrumentalities of the crime and property forfeited as proceeds, the district court determined that none of the forfeitures violated the Eighth Amendment.

The court began by noting that the jury's general forfeiture verdict left it unclear which properties the jury determined forfeitable as proceeds of the crime, and which as instrumentalities. The court said that it makes little sense to perform a proportionality

analysis for property forfeited as the proceeds of the crime; but it explained that, nevertheless, this is what the Fourth Circuit required in *United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993). Another panel, in *United States v. Wild*, 47 F.3d 669 (4th Cir.), cert. denied, 116 S.Ct. 128 (1995), did state that the forfeiture of the proceeds of crime could never be challenged as excessive, but the panel that remanded the instant case cited *Borromeo*, not *Wild*, in its order. With the case law "thus difficult to reconcile," the court concluded that it was required "to undertake a proportionality analysis for both the proceeds and the instrumentalities forfeited."

It then performed its proportionality analysis, finding the forfeiture proportional based on the following factors: the potential fine far exceeded the value of the property; the house, land and truck were intimately involved in defendant's narcotics business; the house, truck and bulldozers were probably financed with drug proceeds since defendant had a paucity of legitimate income; the length of the conspiracy; the number of participants; and the conspiracy's effect on the community. *BB*

United States v. Shifflett, 1996 WL 560113 (W.D. Va. Sept. 23, 1996) (unpublished). Contact: AUSA Ken Sorenson, AVAW01 (ksorenso).

Probable Cause / Excessive Fines

- **Defendant's history of drug dealing during period when property was acquired is sufficient to establish probable cause to believe property is forfeitable as drug proceeds.**

- **A dispute as to the number of drug deliveries that occurred on real property is a material issue of fact regarding whether forfeiture of the property violates the 8th Amendment.**

The United States moved for summary judgment regarding the forfeiture of the defendant real properties pursuant to 21 U.S.C. §§ 881(a)(6) and (a)(7), alleging that they were proceeds traceable to illegal narcotics transactions and were used to facilitate the commission of various narcotics offenses. The claimant, who had been convicted of conspiracy to distribute cocaine during the period of 1988 through 1991, in violation of 21 U.S.C. § 846, argued that the government failed to establish probable cause for the forfeiture of these properties since they were purchased prior to 1988. The claimant maintained that there was no evidence that these properties were purchased with drug proceeds since he was convicted only of engaging in a drug conspiracy that began in 1988.

The court found that the government carried its burden as to probable cause. The court opined that the defendant's conviction coupled with the testimony of a co-defendant during the claimant's detention hearing that the claimant had been involved in drug trafficking for 15 years provided a reasonable probability that claimant purchased the defendant properties with drug proceeds.

With regard to one of the defendant properties, an

apartment building, the claimant argued that forfeiture of the entire building would be excessive under *Austin v. United States*, 113 S. Ct. 2801 (1993). The court found that the claimant had raised a genuine issue of material fact as to whether there was only one or more than one cocaine delivery made to that property. Accordingly, the government's motion for summary judgment was granted in part and stayed in part. *MDR*

United States v. 120 South Wareham Lane, ___ F. Supp. ___, 1996 WL 507244 (N.D. Ill. Sept. 4, 1996). Contact: AUSA Ernest Ling, AILN02(eling).

Administrative Forfeiture / Notice

- ❒ **District courts lack jurisdiction to consider questions going to the merits of administrative forfeitures, including 8th Amendment issues.**
- ❒ **District courts may address due process violations in administrative forfeitures, such as a failure to provide adequate notice of the proceedings.**
- ❒ **Notice sent to, and received at, a potential claimant's last known address and his address of incarceration, combined with notice by publication, is more than sufficient to meet due process requirements, even where the potential claimant may not have received actual notice.**

Petitioner was convicted of RICO charges and sentenced to life imprisonment. Various personalty and realty, to which petitioner made, or could have made, a claim, was forfeited judicially. As to certain other personalty, which the DEA was forfeiting administratively, notice was made by publication and by certified letters, return receipt requested, to petitioner's last known address and to his address of incarceration. Return receipts, signed by persons other than petitioner, were received for both certified letters. No claims were made in the administrative forfeitures and the property was administratively forfeited.

Petitioner did not appeal the judgments of forfeiture in the judicial cases. Some years later, Petitioner filed a *pro se* motion with the district court, wherein, citing *Austin v. United States*, 113 S.Ct. 2801 (1993) and *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994) and complaining of inadequate notice of the administrative forfeiture actions, he requested the return of the judicially and administratively forfeited property.

The district court made short shrift of petitioner's request for return of the judicially forfeited property: petitioner had not appealed the judgments and thus his petition "was not properly before [the] Court and will not be addressed."

Turning to the administrative forfeitures, the court first reviewed the administrative forfeiture process -- concluding that "once the administrative process has begun, the district court loses subject matter jurisdiction to adjudicate the matter in a peripheral setting such as a Rule 41(e) motion" -- except that "if an administrative forfeiture is procedurally deficient, the court has jurisdiction to correct the deficiency." Thus, the court held that it lacked jurisdiction to

consider the merits of whether the administrative forfeitures constituted either excessive fines or double jeopardy (those being the arguments the court assumed petitioner intended to raise with his references to *Austin* and *Kurth Ranch*).

As to the notice required by due process, the government had more than met its burden. The standard was not *actual* notice, but rather notice "reasonably ... likely to inform [petitioner] of the [forfeiture] proceeding." Here the government had sent notice to addresses reasonably likely to be those of the petitioner, had received evidence that its notices had been received at the addresses to which they had been sent and had placed additional notices in *USA Today*. That the petitioner may not have received the notice sent to him in prison was irrelevant.

Because the government had met the constitutional requirements for notice, the court was without jurisdiction to disturb the DEA's administrative forfeiture decision. Petitioner's motion for return of property was denied. *JGL*

Concepcion v. United States, __ F. Supp. __, 1996 WL 501506 (E.D.N.Y. Aug. 30, 1996). Contact: AUSA David Goldberg, ANYE03(dgoldber).

Comment: In an unpublished panel decision, the **Sixth Circuit** reached a conclusion at odds with the holding in *Concepcion*. After holding that the district court erred in not allowing the claimant to raise due process challenges to the administrative forfeiture of his property, and remanding the case to consider whether the FBI's efforts to provide notice of the forfeiture were sufficient, the court offered "several comments" on merits of the due process claim.

"If the government is incarcerating a property owner when it elects to pursue a forfeiture action against his property, fundamental fairness requires that the defendant receive *actual notice* of the agency's attempt to forfeit." *Dusenbery v. United States*, 1996 WL 549818 *1 (6th Cir. Sept. 25, 1996) (Table Case) (emphasis added). The court noted that the FBI sent the notice by certified mail to the prison where the claimant was held, but that the "green card" returned by the postal service contained an illegible signature. Thus, the record in the case failed to make clear whether the certified mail arrived at the prison, whether a prison employee signed for it, and whether it was forwarded to the claimant. Finally, the court observed that newspaper publication is inadequate to give notice to a prison inmate of the forfeiture of his property.

The *dicta* in the Sixth Circuit opinion is at odds with several cases, including *Concepcion*, holding that the government's duty to take steps reasonably calculated to give notice of the forfeiture to a prison inmate is satisfied if the seizing agency sends notice to the prison, and that the agency is not responsible for making sure that the notice is actually delivered to the prisoner. *See United States v. Clark*, 84 F.3d 378 (10th Cir. 1996) (mailing notice to inmate's place of incarceration is sufficient; personal service not necessary); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995) (attempts to send notice to defendant's home, attorney and place of confinement were sufficient; failure to receive notice was not government's fault); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996) (publication and sending notice to prison where defendant incarcerated is adequate whether defendant actually receives the notice or not). *SDC*

Administrative Forfeiture / Adoptive Forfeiture

- **Claimant cannot obtain judicial review of administrative forfeiture on the ground that the government did not initiate the forfeiture in a timely manner, or on the ground that the government failed to obtain a proper "turnover order" from a state judge.**

- **Property forfeited by state authorities under state law cannot be ordered returned by a federal court.**

Local police in Tacoma, Washington, seized defendant's automobile and over $110,000 in cash. A federal agency adopted the forfeiture of the automobile which was forfeited administratively. The cash, however, was forfeited by state authorities pursuant to state forfeiture law.

Defendant filed no claim in either action; however, he subsequently filed a Rule 41(e) motion in federal court seeking the return of both the car and the cash.

As to the federal forfeiture, the court ruled that only due process challenges may be entertained by a federal court. Thus, the court lacked jurisdiction to consider the defendant's claims that the government failed to commence the administrative forfeiture in a timely manner, or that it commenced that action without obtaining a "turnover order" from the State of Washington.

As to the state forfeiture, the court ruled that "the government cannot be forced to return property which was seized by state authorities," citing *United States v. Huffhines*, 986 F.2d 306, 308 (9th Cir. 1993). *SDC*

United States v. Valencia, 1996 WL 547934 (9th Cir. Sept. 25, 1996) (Table Case). Contact: AUSA James Lord, AWAW01(jlord).

Comment: Recently, a district court in Pennsylvania reached a contrary conclusion, holding that a federal court could order the return of property forfeited under state law, even though state authorities were not parties to the forfeiture action in federal court. *United States v. Igbonwa*, 1996 WL 515517 (E.D.Pa. Aug. 26, 1996) (October *Quick Release*). That case is likely to be appealed. *SDC*

Administrative Forfeiture

- **Civil action for return of seized property is time-barred if filed more that 6 years after seizure.**

The government arrested Defendant in 1988 and seized $3,200 in cash. Defendant was subsequently convicted of money laundering and incarcerated.

Eight years later, in 1996, Defendant filed a civil action for the return of the money seized at the time of his arrest. The court dismissed the complaint pursuant to 28 U.S.C. § 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *SDC*

Mouawad v. United States, 1996 WL 518080 (E.D.N.Y. Aug. 30, 1996). Contact: AUSA Paul Kaufman, ANYE03(pkaufman).

Administrative Forfeiture / Administrative Procedures Act

- **Administrative Procedures Act does not waive sovereign immunity for acts committed to agency discretion, such as administrative forfeiture decisions.**

- **Federal courts lack jurisdiction to review administrative forfeitures except for procedural errors.**

In 1990 the DEA seized plaintiff's automobile pursuant to 21 U.S.C. § 881(a)(4). It then mailed a notice of the seizure and commencement of administrative forfeiture proceedings to "David Garcia," the registered owner of the automobile. The notice indicated that the administrative forfeiture could be contested by filing a claim in federal court within 20 days or that a petition for remission could be filed with the DEA within 30 days. The return receipt from the notice indicated that "David Garcia" had signed for the envelope containing the notice. Plaintiff thereafter elected to file a petition for remission, which was rejected by the DEA.

Several years later, plaintiff filed a complaint seeking return his by now administratively forfeited automobile on the grounds that it had been seized without probable cause. DEA moved to dismiss the complaint on the grounds of 1) lack of standing, 2) sovereign immunity, and 3) lack of subject matter jurisdiction.

The court quickly found that plaintiff had standing; though he was not "David Garcia," his pleadings asserted that "David Garcia" had been his former alias, and, for the purposes of the DEA's motion to dismiss, plaintiff's pleadings had to be accepted as true.

Next the court addressed sovereign immunity and the lack of subject matter jurisdiction. While part of the Administrative Procedures Act (at 5 U.S.C. § 702) waives sovereign immunity as to agency actions, other parts exclude from that waiver agency actions committed to agency discretion (*see*, 5 U.S.C. § 701(a)(2)). Here, plaintiff was seeking judicial review of the agency's discretionary decision to forfeit the automobile -- a review foreclosed by sovereign immunity. Had plaintiff challenged the adequacy of the notice of the agency proceeding or the authority of the agency to proceed at all, sovereign immunity would not have applied. Similarly, courts lack subject matter jurisdiction to review an administrative forfeiture once the administrative process has begun -- unless it is alleged that the forfeiture was procedurally deficient. Here the complaint did not contest the adequacy of the process, but rather the legal basis for the forfeiture -- an issue which plaintiff could have raised by filing a timely claim.

Accordingly, the complaint was dismissed. *JGL*

Infante v. DEA, ___ F. Supp. ___, 1996 WL 532249 (E.D.N.Y. Sept. 9, 1996). Contact: AUSA Tom Jones, ANYE03(tjones).

Innocent Owner

❒ Claimant who is willfully blind cannot establish innocent owner defense.

Claimant applied for a residential mortgage loan to refinance her mortgage and to remodel other property. She submitted false tax returns with her loan application; she falsely stated the she lived at the property for the past 14 years; and she failed to disclose over $100,000 worth of loans she owed. The government filed a civil forfeiture action against the property under 18 U.S.C. § 981(a)(1)(C) (property traceable to violations of 18 U.S.C. §§ 1014, 1341, 1343 involving false statements to a federally insured financial institution, mail fraud and wire fraud) and moved for summary judgment. Claimant also filed a motion for summary judgment. The district court granted the government's motion and denied claimant's motion.

Claimant first contended the property was not forfeitable arguing there was no risk to the lender because the equity in the property was sufficient to cover the amount of the loan. The court found that the numerous false statements might subject the FDIC to the risk of loss.

She then argued that she was an innocent owner contending that her actions were "consistent with the great majority of people"; "only about 1 out of 100 of such people read the closing documents." She argued that she reasonably relied upon others helping her. The court, relying on *United States v. 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996), concluded that claimant either knew about the false statements made in the loan application or was willfully blind to them and therefore was not an innocent owner. *LJW*

United States v. 3814 NW Thurman Street, ___ F. Supp. ___, 1996 WL 570460 (D. Or. Oct. 1, 1996). Contact: AUSA Bob Nesler, AOR01(bnesler)

Awards to Informants / Assets Forfeiture Fund

❒ **The proper source of money to pay informants for forfeiture assistance is money appropriated for that purpose by Congress from the Assets Forfeiture Fund and not the receipts of an undercover operation.**

As part of a complex, undercover drug and money laundering investigation, the U.S. Customs Service entered into an agreement with a confidential informant under which the informant obtained a percentage of the receipts of the undercover money laundering operation. The investigation resulted in cash seizures of over $7 million dollars and payment of $580,000 to the informant.

A defendant apprehended transporting drugs in the course of the investigation moved to dismiss the charges against him on grounds of outrageous government conduct. The district court denied the motion. After conviction, the defendant appealed arguing that his due process rights had been violated because the informant was paid a "contingent fee" based on the amount of drugs involved and on whether the defendant was convicted. The major part ($400,000) of the $580,000 had been paid to the informant after his testimony at trial.

The **Ninth Circuit** found that the drug defendant was not involved in the money laundering activities for which the informant received a percentage and held that paying an informant based on a percentage of laundered funds and on the overall results obtained in an extensive undercover operation did not constitute outrageous government conduct in violation of the defendant's due process rights. However, Judge Wiggins, in a concurring opinion, was highly critical of permitting a government agency to pay criminal informants large sums of money primarily for information leading to forfeitures.

Judge Wiggins emphasized that awards paid to informants must come from appropriated funds, not from the "commissions" earned by the undercover money launderers. Thus, he found no statutory authorization for the "brokerage commission" arrangement in the Customs Service's agreement with the informant. In his view, the amounts Customs received from the conduct of the undercover money laundering operation were required by law to be deposited into the Treasury and subject to expenditure only through appropriation by Congress. And he saw "no legitimate reason" for Customs to use unappropriated funds to pay an informant for assistance leading to forfeitures when the Treasury Forfeiture Fund (31 U.S.C. § 9703(a)) exists with appropriations for that express purpose. *JHP*

United States v. Cuellar, ___ F. 3d. ___, 1996 WL 523671 (9th Cir. August 26, 1996).
Contact: AUSA Duane Lyons, ACA01(dlyons).

Rule 60(b) / Excessive Fines

- **The proper means of challenging a civil forfeiture judgment is Rule 60(b), not Rule 41(e).**
- **Challenge to forfeiture under the Excessive Fines Clause pursuant to Rule 60(b) is untimely if not filed until 2 1/2 years after *Austin* was decided.**
- **Person who never filed a claim in a civil forfeiture case is not entitled to relief from the forfeiture judgment pursuant to Rule 60(b).**

Defendant, a federal prisoner, filed a motion under Rule 41(e), Federal Rules of Criminal Procedure, and Rule 60(b), Federal Rules of Civil Procedure, to recover a vehicle and certain real property allegedly forfeited by the United States in 1990. The court denied the motion for a variety of reasons.

First, the court noted as a threshold matter that only the Rule 60(b) motion was properly before the court. Because the property was forfeited in a civil case, Rule 41(e) did not apply.

Next, the court held that it was without power to order the return of the real property because that property was never forfeited to the United States. Instead, state court records reflected that the property was foreclosed upon by a mortgage company when Defendant stopped making mortgage payments.

As to the vehicle that was forfeited in the civil case in 1990, the court held that Defendant was not entitled to relief under Rule 60(b) unless she had filed a claim, and was therefore a party, to the original civil action. Defendant's mother did file a claim in that case, but Defendant did not. Accordingly, Defendant had no standing to seek relief under Rule 60(b).

Finally, the court held that the motion was not "made within a reasonable time" as Rule 60(b) requires. The motion was filed nearly 6 years after the civil judgment. More important, to the extent that the motion was based on a change in the law regarding the application of the Excessive Fines Clause, it had to be filed within a reasonable time after the Supreme Court announced its decision in *Austin v. United States*. The court concluded that a motion filed 2 1/2 years after *Austin* is not timely. *SDC*

United States v. Dansbury, 1996 WL 592645 (E.D. Pa. Oct. 15, 1996) (unpublished). Contact: AUSA Judy Goldstein Smith, APAE02(jsmith).

Rule 60(b) / *Good* Hearing / Legitimate Source Defense / Standing / Waiver

- ❒ **Dissatisfaction with one's attorney does not provide a valid basis for a Rule 60(b) motion.**

- ❒ **Movant lacked standing to pursue Rule 60(b) relief where (1) movant failed to file a claim in the civil forfeiture proceeding, and (2) movant could not show a legal interest in a number of properties subject to forfeiture.**

- ❒ **Movant waived any right to a *Good* hearing by failing to promptly request such a hearing upon the announcement of the *Good* decision.**

- ❒ **Movant's conclusory, unsupported statements of a legitimate source for the forfeited properties, particularly in light of his drug trafficking conviction, were insufficient to establish a meritorious defense to the civil forfeiture.**

In October 1991, the government initiated forfeiture proceedings against three pieces of real property and twelve vehicles, alleging that they were the instruments or profits of movant's narcotics trafficking. In November 1991, an attorney filed verified claims to specific properties on behalf of several of movant's family members. The attorney did not file a claim in movant's name, however, although he did file an appearance as his attorney. During the next three years, all of the property was disposed of through voluntary dismissal, settlement, and motions for default and summary judgment after the claimants failed to file proper claims or responses to motions. The forfeiture judgments became final in August 1994.

In 1996, movant filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6), seeking relief from all final orders of forfeiture. To succeed, movant must show: (1) good cause for the default, (2) quick action to remedy the judgment, and (3) a meritorious defense to the underlying action.

The government argues that movant never filed a claim in the civil forfeiture proceeding, and thus lacks standing to bring a Rule 60(b) motion. Movant argues that his failure to file a claim was a result of his attorney's gross negligence and willful misconduct. However, dissatisfaction with one's attorney does not provide a basis for Rule 60(b) relief. The proper remedy for attorney incompetence is a lawsuit for malpractice. Moreover, because movant chose his attorney to represent him, the attorney's conduct is imputed to movant. Clients are bound by their attorney's acts, whether willful or grossly negligent. Therefore, the more egregious the attorney's conduct, the further outside Rule 60(b)'s excusable neglect provision it falls.

Even if movant had filed a claim, he would not have standing to contest the forfeiture of properties in which he had no interest. Article III of the Constitution requires a claimant to have a property interest before a "case or controversy" exists; filing a verified claim establishes only statutory standing. Movant concedes that not all the forfeited properties belonged to him. Accordingly, his attorney's negligence is irrelevant, at least regarding those properties, because movant would not have had standing even if he had filed claim.

Movant also argues that the failure to conduct a pre-deprivation hearing supports the granting of a Rule 60(b) motion. Under *Good*, a preseizure hearing must be held before realty can be confiscated. However, movant has no standing to request a hearing because he has no standing as to the property. Even if he had filed a verified claim to the real property, the failure to invoke the right to a hearing as soon as the court issued its opinion in *Good* would have resulted in waiver of the hearing.

Finally, movant's conclusory assertion that he purchased the properties with legitimate income, especially in light of movant's drug trafficking conviction, is insufficient to establish that he has a meritorious defense to the civil forfeiture action. For all of these reasons, the district court denied movant's Rule 60(b) motion to vacate the civil forfeiture judgments. *RMJ*

United States v. 8136 South Dobson, 1996 WL 535146 (N.D. Ill. Sept. 18, 1996) (unpublished). Contact: AUSA Jack Donatelli, AILN02(jdonatel).

Double Jeopardy

❒ *Ursery* does not constitute a "new rule" under *Teague v. Lane*; therefore it applies to pending section 2255 motions.

Defendant filed a section 2255 motion challenging his criminal conviction on double jeopardy grounds before the Supreme Court issued its decision in *Ursery*. After that decision was announced, defendant argued that it should not apply to his case because it announced a "new rule" of constitutional law.

In *Teague v. Lane*, 489 U.S. § 288 (1989), the Supreme Court said that a decision constitutes a "new rule" if the result "was not dictated by precedent existing at the time the defendant's conviction became final." The court then reviewed the *Ursery* decision and determined that it was dictated by a long line of double jeopardy decisions that were in effect at the time of the defendant's conviction. "The Supreme Court in *Ursery* [was] not articulating a new rule of law at all, but rather clarifying and reaffirming an age-old rule of law." Therefore, *Ursery* applied retroactively and foreclosed the defendant's double jeopardy argument. *SDC*

United States v. Slater, 1996 WL 594055 (D. Kan. Sept. 17, 1996). Contact: AUSA Annette B. Gurney, AKS01(agurney).

Restraining Order / Substitute Assets

❒ Pre-trial restraint of substitute assets is still available in the Second Circuit.

Defendants moved to vacate a pre-trial restraining order that restrained certain property as "substitute assets." The court, in the Eastern District of New York, acknowledged the split in the circuits on this issue: the Second and Fourth Circuits authorize pre-trial restraint of substitute assets while the Third, Fifth, Eighth and Ninth Circuits do not. Moreover, defendants argued that the Second Circuit case,

United States v. Regan, 858 F.2d 115 (2d Cir. 1988), did not address the issue directly and should not be regarded as conclusive.

The court held, however, that *Regan* "inescapably leads to the conclusion that [the Court of Appeals for the Second Circuit] views the pre-trial restraint of substitute assets as permissible." Accordingly, the motion to vacate was denied. *SDC*

United States v. Bellomo, 96 Cr. 130 (LAK) (E.D.N.Y. Sept. 16, 1996). Contact: AUSA Leonard Lato, ANYE03(llato).

Bankruptcy / Homestead Exemption

- **Civil forfeiture action is exercise of the federal government's police power and thus is exempt from the automatic stay provision of the bankruptcy code.**
- **Federal forfeiture law preempts the state homestead exemption.**

On August 31, 1995, the government obtained a final consent judgment of civil forfeiture against real property on grounds that it facilitated the commission of a narcotics offense in violation of 21 U.S.C. § 881(a)(7). The judgment provided that if claimant paid $40,000 to the government within 45 days of the date of the judgment, the property would not be forfeited. Claimant failed to pay the $40,000, and the government offered the property for sale.

On November 30, 1995, claimant filed a motion in district court seeking an additional 45 days to produce the $40,000. The court granted this motion on December 5, 1995. On the same date, claimant filed a Chapter 13 petition in bankruptcy court. Claimant scheduled the property as his exempt homestead. No timely objection was filed to the claimed exemption. On January 19, 1996, the time period within which claimant could pay the $40,000 and retain the property expired.

Claimant filed an amended complaint seeking, *inter alia*, to determine the extent, validity, and priority of the Government's alleged lien on the property; to avoid the preferential transfer to the Government; to impose a stay against the Government; and to avoid the Government's lien under 11 U.S.C. §§ 544 and 545. The parties filed cross-motions for summary judgment.

The bankruptcy court granted the Government's motion for summary judgment. As a preliminary matter, the civil forfeiture action was an exercise of the federal government's police power exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). So, when claimant failed to pay the $40,000 by January 19, "the property ceased to belong to him." Moreover, federal forfeiture law preempted the Florida constitutional homestead exemption. Thus, neither claimant's bankruptcy nor his claim of homestead prevented the forfeiture of the property. Claimant accordingly had no interest in the property. *RMJ*

In re Brewer, No. 95-15897-BKC-AJC (Bankr. S.D. Fla. Oct. 8, 1996). Contact: AUSA Bill Beckerleg, AFLSL01(wbeckerl).

Comment: Claimant has appealed to the district court the bankruptcy court's order granting summary judgment to the Government. *RMJ*

New Rule 32(d)(2) will take effect December 1, 1996

As previously noted in *Asset Forfeiture News* (May/June 1996) the new version of Rule 32(d)(2), Federal Rules of Criminal Procedure, which relates to the form and timing of the issuance of a criminal order of forfeiture, will take effect on December 1, 1996. The new Rule is designed to allow courts to issue a preliminary order of forfeiture immediately after the verdict so that the property can be seized, and the ancillary proceeding can be commenced, before the defendant is sentenced. The order of forfeiture would then become final, as to the defendant, at the time of sentencing and must be included in the judgment. Of course, the order may still be amended to recognize third party rights at the conclusion of the ancillary proceeding. The text of the new Rule appears in the pocket part of the Federal Criminal Code and Rules. *SDC*

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